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254087—53

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 688

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 114–123) and dissenting opinions (R. 123–127) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 28, 1953 (R. 127–128). The petition for a writ of certiorari was filed on March 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a) F. R. Crim. P.

QUESTION PRESENTED

Whether in a prosecution for wilful violations of consumer credit regulations in the installment

sales of sewing machines, the court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner owners of the business.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 10 *et seq.*

STATEMENT

Petitioners Gordon and Tempkin, together with Deverich, Stone, and Turner, were charged in the United States District Court for the District of Utah with violations of Sections 601 and 603 of the Defense Production Act of 1950 (64 Stat. 798, 812, 814) and Regulation W (51 F. Reg. 6118 as amended 15 F. Reg. 6931) promulgated thereunder (pp. 10–12, *infra*). The first count in the information charged that the two petitioners and Deverich and Stone, on March 21, 1951, made an instalment sale of a sewing machine to Buean E. Colley, and that on the delivery of this machine they unlawfully, knowingly, and wilfully accepted and received a down payment of less than 25 percent of the sale price (R. 3). The second count charged the same persons with unlawfully, knowingly, and wilfully failing to keep records showing the amount of the purchaser's down payment in the instalment sale of the machine to Buean E. Colley (R. 3–4). The third count charged that the two petitioners and Deverich, Stone, and Turner, on May 17, 1951, made an instalment sale of

a sewing machine to Evelyn Allen and extended credit knowing that other credit had been extended therewith, so that the total amount of credit in connection with the sale exceeded 75 percent of the sale price (R. 4). The fourth count charged that the persons mentioned in count three conspired to violate Sections 601 and 603 of the Act and Regulation W by making the sale of the machine to Evelyn Allen as alleged in count three (R. 4–5).

The jury found all the defendants guilty as charged (R. 8). Petitioners were given concurrent sentences of imprisonment for one year and a $2,500 fine on each of the four counts, with nine months of the jail sentence suspended, and the fines suspended on all but one of the four counts (R. 10–11). On appeal (R. 13–14) their convictions were affirmed by a divided court (R. 127–128).[1]

The evidence may be summarized briefly as follows:

Petitioners Gordon and Tempkin were engaged in the business of selling new and used sewing machines as a partnership under the name of National Stores, first in Los Angeles and later in Salt Lake City, Utah, where the sales laid in the information were made (R. 17, 32, 79–80).

[1] The court below reversed the convictions of Deverich and Stone on the ground of insufficient evidence (R. 117–118, 123). Turner was given a suspended sentence, placed on probation, and did not appeal (R. 9).

An intensive newspaper and radio advertising campaign for low priced re-built sewing machines to be purchased on time stimulated sales. In most instances new and more expensive machines instead of the re-built models were sold, thereby increasing the salesmen's commissions. One salesman testified that he made about 50 sales, in about 80 percent of which he took "I. O. U.'s" for down payments; that these were turned into the company office and treated as cash as far as the company was concerned; and that he was paid the full amount of his commissions irrespective of the down payments. He testified that the management told the salesmen to procure the required 25 percent down payment, but to accept an "I. O. U." for it if they could not get it otherwise. (R. 29–30, 86, 87.)

Regarding the Colley sale forming the basis for counts one and two, one Tempkin made the sale at the company store. Colley paid $1.00 to hold the machine until his next payday when he brought in an additional $15.00 before taking the machine away. A Mr. Tempkin, in the presence of Mrs. Colley, signed on the date of the sale the conditional sale contract, showing the price as $152.95 with a stated down payment of $38.95, but the signature on the contract was obliterated. The receipt for the original $1.00 bore a signature "E. Tempkin." Colley later made additional payments of $4.00 and $3.00 on the down pay-

ment to a female employee at the store, $23.00 being the total amount paid on the stated down payment of $38.95 (R. 31–38, 72, 103–104, 109). There were two Tempkins connected with the organization, the petitioner Eli and an Irving Tempkin (R. 73). The Government's evidence did not identify which of the Tempkins made this sale.

In the Allen sale forming the basis of counts three and four, the salesman Turner made the sale after bringing the machine to the purchaser's house. The conditional sale contract showed the price of $152.95 including tax, with a down payment of $38.95. The purchaser paid only $13.00 of this stated down payment, signed three "I. O. U.'s" for $6.50 each, and on subsequent dates mailed in envelopes addressed to the company, with the salesman's name on the inside, three money orders for $6.50 each. The obligation for the balance of the down payment was to the salesman alone. (R. 41–45, 70, 104.)

There was also evidence as to numerous other instalment sales of sewing machines to persons other than those named in the information, where less than the required 25 percent down payment was made at the time of the purchases (R. 46, 51, 52, 54–55, 56, 57, 64–65, 66, 68–69, 104, 105, 106).

Petitioner Gordon was the general manager, and gave talks at sales meetings at the Salt Lake City store. He resided in Los Angeles and vis-

ited the Salt Lake City store two or three times during 1951. (R. 29, 73.) Gordon identified company records showing proper down payments by purchasers, and the deposits of these in a Salt Lake City bank (R. 74–76, 106–107). Gordon denied instructing any company employees that they could waive the down payment required by Regulation W, and testified that he had no knowledge of any transactions where less than the down payment was required, until the time of a hearing before the Federal Reserve Board about such discrepancies (R. 78–79, 82). Gordon admitted that at the end of that hearing he stated: "Everything that isn't right has been discontinued" (R. 85).

DISCUSSION

All three judges in the court below agreed that, in the words of the dissenting judge, the "evidence is sufficient to sustain a conclusion that the partners had reason to know that the regulations were being violated by their employees" (R. 123–124). The basis of the dissent below and petitioners' principal contention in this Court is that the case was not submitted to the jury under proper instructions. This argument stems from the judge's charge that "the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer," if the knowledge of the agent was obtained while engaged in the business of the employer in the scope of his employment (R. 92–

93).[2] In the words of the majority below, "[w]hat the court did in effect was to make wilfulness an essential element of the offenses charged in the information, and to charge the employers [petitioners] with the guilty knowledge and acts of the employees in determining the question of wilfulness" (R. 121).

This is admittedly the standard applied in determining the criminal liability of corporations, even where, as here "wilfulness" is an element of the offense. *C. I. T. Corp.* v. *United States,* 150 F. 2d 85, 89–90 (C. A. 9). It has not hitherto been applied to noncorporate owners where intent is an element of the crime.

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[2] Petitioners' other contentions are merely restatements of the same basic contention. They argue that, under the charge, a conviction for conspiracy was possible without proof that they had knowledge of the conspiracy (Pet. 13–14.) However, the court, after describing the offense of conspiracy (R. 95–96), stated:

"* * * that is a question * * * which the court submits to you for your determination under count 4, whether or not, as the court has defined the word 'conspire' to you, from all the facts and circumstances in this case you find that there was an agreement, or an understanding, or a scheme to violate the law of the United States; * * *"

Nevertheless, since the general instruction as to imputing knowledge preceded the discussion of the specific counts, it is possible that the jury could have thought that, under the instructions, the same general rule applied to all counts. We therefore agree that the case must stand or fall on the validity of this general instruction.

Similarly petitioners' attack on the sufficiency of the evidence (Pet. 14) is merely upon the use of the standard set forth in the charge as quoted above.

A corporation can act only through agents, and a corporation as such cannot go to jail. Insofar as individual liability is concerned, it is a general principle of criminal law that guilt is personal. Hence the rule laid down by the decided cases is that a master or employer is not criminally responsible for the acts of his agent or employee which he did not authorize, counsel, advise, approve, or ratify. *Lurding* v. *United States,* 179 F. 2d 419, 421 (C. A. 6); *Paschen* v. *United States,* 70 F. 2d 491, 503 (C. A. 7); *Nobile* v. *United States,* 284 Fed. 253 (C. A. 3); *United States* v. *Cohn,* 128 Fed. 615 (S. D. N. Y.); Sayre, *Criminal Responsibility for the Acts of Another,* 43 Harv. L. Rev. 689.

There is a well-recognized exception to this rule for certain types of welfare legislation as to which intent is not an element of the offense. *United States* v. *Dotterweich,* 320 U. S. 277, 281; *United States* v. *Behrman,* 258 U. S. 280. Consumers' credit controls, such as are involved in the instant case, might well have fallen in this category if Congress had not limited the penal provision, which imposed sentences up to imprisonment for one year, to persons who "wilfully" violate. This requirement of wilfulness seems plainly to manifest a congressional intention that individual violators of the statute should not be punished in the absence of criminal intent. There is no doubt that "wilfully" as used in this type of statute means no more than that the act constituting the

violation must be knowingly and intentionally performed. *Cf. Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. A. 1), certiorari denied, 323 U. S. 712. See also *Browder* v. *United States,* 312 U. S. 335, 341. But while the word implies no evil motive, it does imply a *mens rea* which is essentially personal and individual. We therefore believe that it was error for the court below to affirm the conviction of petitioners on a charge which did not require that they have the intention to violate the law as described above.

CONCLUSION

There was ample evidence of petitioners' guilt. Since the charge to the jury was, in the opinion of both petitioners and respondent, improper for the reasons stated, the case may appropriately be disposed of summarily. The petition for certiorari should be granted and, if the Court agrees with these views, the judgment of the Court of Appeals vacated and the case remanded to the District Court for retrial.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

MAY 1953.

APPENDIX

Statutes and Regulations Involved

The Defense Production Act of 1950, 64 Stat. 798, 812, 814, provides:

> Sec. 601. To assist in carrying out the objectives of this Act, the Board of Governors of the Federal Reserve is authorized * * * to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary * * *.
>
> * * * * * *
>
> Sec. 603. Any person who willfully violates any provision of section 601 or 602 or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Part 222—Consumer Regulation W, September 8, 1950, 15 F. Reg. 6118, as amended October 16, 1950, 15 F. Reg. 6931, provides:

> § 222.2 *General requirements and registration—*
>
> (a) *General requirements.* Each person engaged in the business of making instalment sales * * * is referred to in this part as a "Registrant"; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him * * * except on the following conditions:

(1) He must have a license, and each Registrant is hereby granted such a license * * *.

(2) The credit extended * * * must comply with the applicable requirements of this part.

* * * * *

§ 222.3 *Instalment sales; general rules* * * *

(a) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (c) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

(b) *Amounts and intervals of instalments; record.* * * * The information specified in § 222.6 (c) shall be set forth in a bona fide record of any transaction subject to this section.

(c) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article * * *.

§ 222.6 *Certain technical provisions.* * * *

* * * * *

(c) *Record of instalment sale.* The record of an instalment credit arising from the sale of a listed article and required by § 222.3 (b) shall set forth (in any order) the following information:

(1) A brief description identifying the article purchased;

(2) The cash price of the article;

(3) The amount of the purchaser's down payment (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating

the monetary value assigned thereto in good faith;

(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

(5) The time balance owed by the purchaser, which is the sum of items (2) and (4) minus item (3); and

(6) The terms of payment.

* * * * *

(i) *Side loan to make down payment.* A Registrant shall not extend any credit for financing the purchase of any listed article if he knows or has reason to know that there is, or that there is to be, any other credit of any kind extended in connection with the purchase of the listed article which would bring the total amount of credit extended in connection with such purchase beyond the amount of instalment credit permitted by this part; but, if the Registrant accepts in good faith a written statement signed by the obligor that no such other credit exists or is to be extended, such statement shall be deemed to be correct for the purposes of the Registrant.

§ 222.9 *Supplement.*

Part 1. *Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used are "listed articles", and the following required down payments and maximum loan values are prescribed * * *

Group B—25 percent minimum down payment, 75 percent maximum loan value:

* * * * *

9. Sewing machines designed for household use.

U. S. GOVERNMENT PRINTING OFFICE: 1968

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In The

Supreme Court of the United States

OCTOBER TERM, 1953

No. 318

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority opinion of the Court of Appeals (O.R.[1] 114-123) is reported at 203 F. 2d 248. The dissenting opinion (O.R. 123-127) is reported in 203 F. 2d at 254. The order on reconsideration, made pursuant to the mandate of this Court (R. 1-2) has not been officially reported, but appears at page 3 of the Transcript of Record. The dissenting opinion to the order appears on the same page.

JURISDICTION

The judgments of the Court of Appeals were entered February 28, 1953 (O.R. 127-128). June 1, 1953, this Court vacated the judgments and remanded the cause to the Court

[1] In the Order Allowing Certiorari filed November 9th, 1953, it was ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to the Writ. For purposes of clarity we therefore will use the symbol O. R. in referring to the pages of said original transcript.

of Appeals "for consideration in the light of the Government's confession of error" (R. 2). August 7, 1953, the Court of Appeals, upon reconsideration, reentered the judgments (R. 3-4). A second petition for a writ of certiorari was filed on September 4, 1953, and was granted on November 9, 1953 (R. 5). The jurisdiction of this Court is invoked under Title 28, U. S. C. 1254 (1). See, also, Rules 37 (b)(2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines, the Court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business.

2. Whether the Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute the employer a co-conspirator when such guilty knowledge was acquired by the employee acting within the scope of his employment.

3. Whether the Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offenses, that there was sufficient evidence to support the verdict of guilty.

STATUTES INVOLVED

The federal statutes involved are Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and Section 371, Title 18, United States Code. Pertinent portions of these statutes are quoted in the appendix, infra P. 16 et seq.

STATEMENT

The judgment of the Court of Appeals sought to be reviewed, reinstated a previous judgment which affirmed, as to the petitioners a judgment of the Trial Court convicting the petitioners and others of substantive offenses in violation of Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and of conspiring to violate the provisions of said Defense Production Act.

The Information

The Information contained four counts, and charged the petitioners, with others, of criminal offenses against the United States. The First Count charged a wilful acceptance of a down payment in an amount less than a sum equal to 25% of the cash purchase price in a sale of a sewing machine to Buean E. Colley. (O.R. 3)

The Second Count charged a wilful failure to keep and preserve bona fide records showing the amount of the purchaser's down payment in an instalment sale of a sewing machine to Buean E. Colley. (O.R. 3, 4)

The Third Count charged a wilful extension of credit, knowing full well that other credit had been extended in connection with the sale, so that the total amount of credit in connection with a sale of a sewing machine to Evelyn Allen was beyond 75% of the cash price of the machine. (O.R. 4)

The Fourth Count charged a conspiracy in violation of Section 371, Title 18, United States Code. This charge was not a general conspiracy, but merely charged a conspiracy to commit an offense against the United States in violation of the section and regulation above set out, "which offense consisted of the defendant knowingly making an instalment

sale of a sewing machine designed for household use to one Evelyn Allen, and knowingly extending credit in connection with such sale beyond and in excess of 75% of the cash price of said sewing machine." (O.R. 4 & 5) No overt act was alleged. (O.R. 4 & 5)

The Evidence

Counts One and Two are based upon the sale of a sewing machine to Buean E. Colley. (O.R. 3, 4) Both Mr. and Mrs. Colley frequently referred to a Mr. Tempkin as the salesman who made the sale to them. (O.R. 31, 38) There were two Mr. Tempkins in the organization: one the petitioner Eli Tempkin, and the other Irving Tempkin. (O.R. 73) Although Mr. Eli Tempkin was in the courtroom during the entire trial, no attempt at identification was made by either Mr. or Mrs. Colley. The identification of Mr. Tempkin is solely dependent upon a signature appearing on Exhibit "2", shown at page 109 of the original transcript. Whether the first letter is a capital "T" or whether it is an "E" traversed by a "T" is difficult to determine. In commenting upon this evidence, the trial court addressed the prosecuting attorney as follows:

> "Mr. Lowry, in the course of the evidence it was your duty to have your witness identify these people and you failed to do it in this respect by any positive and direct evidence." (O.R. 91)

The Court of Appeals, in commenting upon the same matter, stated,

> "Since, as we have seen, there is no direct or positive proof that Eli Tempkin made the Colley sale, we have no need to consider whether as a matter of law his partner Gordon could be criminally responsible for his acts, for the conviction of neither of them could stand upon that proof." (O.R. 119)

Counts Three and Four are both based upon a sale of a sewing machine to Evelyn Allen. (O.R. 4-5) Evelyn Allen

testified that the salesman who made the sale to her was named Mr. Turner. He was accompanied by another salesman whose name she did not know and who was never otherwise identified (O.R. 42)

Petitioners Allan Gordon and Eli Tempkin at the times laid in the Information were partners doing business under the name of National Stores. (O.R. 17) Over the objection of counsel for the petitioners that certain evidence was not within the scope of the offenses laid in the Information, testimony from many purchasers not mentioned in the four counts of the Information was taken concerning sales wherein a payment of less than 25% down was made. (O.R. 30, 36, 48, 49, 52, 53, 54, 57, 64, 66, 68)

Petitioner Allan Gordon took the stand and testified that he had never had knowledge of the alleged wrongful acts and introduced the records of the company which showed proper down payments, and copies of the contracts of sale signed by the purchasers showing that the lawful down payments had been made. (O.R. 74, 75, 76)

In addition to the testimony of Mr. Gordon that receipts from the Salt Lake Store were put in the Continental Trust and Savings Bank (O.R. 75), defendants' Exhibits "B", and "C", "D", "E" and "F" showed that the down payments in the correct amounts were deposited in the Continental Bank from the transactions in all four counts of the Information; that is, in the cases of Buean E. Colley and Evelyn Allen. (O.R. 106)

The testimony of the purchasers was in conflict with the documentary evidence, but since there was no testimony that Mr. Gordon either directed or acquiesced in the falsification of the records, his testimony was entirely reconcilable with the testimony of the purchasers.

The only witness who ever referred to the appellant Gordon was a salesman of National Stores, William C.

Romney, who stated that Gordon appeared at the place of business as general manager. He stated that he would be there and talk occasionally. He stated that they had sales meetings. (O.R. 29) The uncontradicted testimony of Allan Gordon was to the effect that during the year 1951 he came to Salt Lake City two, or not more than three, times. (O.R. 73) Mr. Gordon further testified that by written agreement they required all salesmen to get a deposit with the bookkeeper of 25% of the selling price of the machines. In order to see that this was done, they kept records, bank and interoffice records, book records, everything that goes to make a sale. They had a bank account in the Continental National Bank. (O.R. 74)

On the 17th day of May, 1952, petitioners were found guilty on all four counts of the Information. (O.R. 7, 8) On June 27, 1952, the Court imposed sentence upon Allan Gordon of one year in the Salt Lake County Jail and a fine of $2500.00 on each of the four counts of the Information, the sentences to run concurrently, but suspended nine months of the jail sentence and the fine of $2500.00 on each of three of the counts, thus making the ultimate sentence imposed $2500.00 and a jail sentence of three months. (O.R. 8, 9) A like sentence was imposed upon Eli Tempkin. (O.R. 8 & 9) The Court of Appeals for the Tenth Circuit sustained the conviction. (203 F. 2d 248) Petitioners previously presented to this Court a petition for writ of certiorari. The Solicitor General for the United States filed a memorandum in Case No. 688, October Term 1952 of this Honorable Court, confessing error. Whereupon this Court granted the writ of certiorari and issued a mandate returning the cause to the Court of Appeals for reconsideration in light of the admission. (R. 2) Thereafter, the Court of Appeals reentered the judgments in adherence to the majority views expressed in the original opinion, with the Hon. Walter A. Huxman, Circuit Judge, dissenting. (R. 3) The present petition for writ of certiorari was filed

by petitioners September 4, 1953. The writ was granted November 9, 1953. (R. 5)

SPECIFICATION OF ERRORS

I.

The Court of Appeals erred in affirming the conviction of the petitioners in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines wherein the jury was instructed that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business.

II.

The Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute an employer a co-conspirator when such guilty knowledge was acquired by the employee acting in the scope of his employment.

III.

The Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offense, that there was sufficient evidence to support the verdict of guilty.

SUMMARY OF ARGUMENT

I.

The instructions under which the guilt or innocence of the petitioners was submitted by the trial court to the jury for determination were erroneous in charging that, "the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer." (O.R. 92, 93) The rule laid down by the decided cases is that a master or employer is not criminally responsible for the acts of his agent or employee which he did not authorize, counsel, advise,

approve, or ratify. Lurding v. United States, 179 F 2d 419, 421 (C. A. 6); Paschen v. United States, 70 F 2d 491, 503 (C. A. 7); Nobile v. United States, 284 Fed. 253 (C. A. 3). United States v. Cohn, 128 Fed. 615 (S. D. N. Y.); It was manifestly not the intention of Congress that Consumers credit controls involved in this case should be within the category of welfare legislation in which an intent is not an element of the offense, for the enactment specifically penalizes only "wilfull violations." 50 App. USC 2133 (infra 16). Thus a mens rea which is essentially personal and individual is recognized as an element of the offense. Under the instructions of the court this element of the offense was eliminated from consideration in securing the conviction of petitioners. In applying the principles of criminal law relating to corporations as set forth in the Inland Freight Lines vs. United States, case, 191 F 2d 313, to the case at bar in order to sustain the trial courts erroneous instruction the Court of Appeals in turn erred. The result is a departure from the accepted and usual course of judicial proceedings so as to constitute a violation of petitioners' rights under the Fifth amendment of the Constitution of the United States of America, depriving them of their liberty and property without due process of law.

II.

The effect of the trial court's instructions as affirmed by the court of appeals is to hold that personal knowledge of a conspiracy is not an element of a conspiracy charged under 18 U. S. C. 371. This is in direct conflict with previous decisions of this court holding that persons having no knowledge of the conspiracy are not conspirators. United States vs. Salvator Falcone, 311 U. S. 205, 85 L. Ed. 128; Direct Sales Co. vs. United States, 319 U. S. 703, 87 L. Ed. 1674.

III.

Both the trial court and the Court of Appeals admitted the insufficiency of the evidence to sustain a conviction of

petitioners in the absence of responsibility for the criminal acts of their employees. (O.R. 91, 118, 119) By instructing the jury that the petitioners were responsible for the criminal acts of their employees the trial court deprived the petitioners of the right to have the sufficiency of the evidence to support the verdict of guilty against them determined. By affirmance of the trial court's action the Court of Appeals also erred, and the petitioners have never had the sufficiency of the evidence against them correctly determined in the light of the existing law.

ARGUMENT

I.

The Court of Appeals erred in affirming the conviction of the petitioners in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines wherein the jury was instructed that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business. (O.R. 92, 93, 119)

The Court of Appeals, in holding that the employers are charged with guilty knowledge and acts of employees in determining the question of wilfulness, erroneously relied upon the Inland Freight Lines vs. U. S., 10th Circuit case, 191 F. 2d 313, wherein the defendant was a corporation. The position of petitioners is adequately stated in the dissenting opinion of Judge Huxman (O.R. 125) wherein it is conceded that the knowledge of the agents of a corporation is the knowledge of the corporation. That is a well established principle of criminal law as applied in the case of a corporation, but is clearly distinguishable from the case at bar.

> "As a separate entity and aside from its agents and employees a corporation can do nothing. It has no conscience, will, or power of thought. It acts only through its agents. Their acts are the only acts

it can commit and their knowledge of necessity is the only knowledge it can have." (O.R. 125).

Judge Huxman is supported by well established authority on this point which he cites in his opinion.[1]

No corporation was involved in the case at bar. In the words of Judge Huxman,

> "The jury was not asked to determine, or was not told, that it was necessary to find that the partners had knowledge or intent that the law was being violated." (O.R. 127)

The law requiring knowledge of the employer in order to hold him criminally responsible for the acts of his employees has been recognized in several Circuits.

A. The Third Circuit in Nobile vs. United States, 284 Fed. 253, held that an employer cannot be held criminally liable for the act of his agent merely because it is in the course of his business and within the scope of his agent's employment.

B. The Sixth Circuit in Lurding vs. United States, 179 F. 2d 419, held that the doctrine of respondeat superior is not to be drawn from the law of negligence and applied to criminal liability.

C. The Seventh Circuit in Paschen vs. United States, 70 F. 2d 491, held that civilly one is responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he intentionally does that which the law denounces and penalizes.

D. The Second Circuit in United States vs. Cohn, 128 Fed. 615, held that it is a rule in criminal cases that a partner is not charged by the criminal acts

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[1] Burdick Law of Crime, Sec. 175, 178, 179; Bishop New Criminal Law, Sec. 417; Kunz v. Lowden, 124 F. 2d 911; Harvey Furniture Co. v. Foust, 124 S.W. (2d) 695.

of his copartners or of others acting in behalf of the firm, unless he has knowledge thereof.

Petitioners were not only fined $2,500.00 each, but were both sentenced to serve one year in jail with nine months suspended (O.R. 10, 11); this without due process of law. In the words of the dissenting opinion, in the court below,

> "But while it is important that the guilty be brought to trial and speedily punished, it is even more important to the preservation of our institutions that due process be observed in bringing that about. Due process means that the trial must be conducted according to recognized principles of law and procedure. It requires an impartial trial. It is necessary that only competent evidence be received and that the jury be correctly instructed as to the basic principles of law, guiding it in its deliberations and considerations of the evidence in the case. The partners denied intent to violate the law or any knowledge that their employees were violating it. They were entitled to have their testimony weighed and evaluated under proper instructions by the court together with all other relevant evidence. They were entitled to have the jury told that they were not criminally liable for the acts of their employees, although committed within the scope of their employment, unless they directed such activities or had guilty knowledge thereof." (O.R. 124)

In the matter of the previous petition for Writ of Certiorari to this Court, Case No. 688, the Solicitor General of the United States filed a memorandum conceding and admitting this error in instruction by the trial court. He further recommended that the matter be disposed of summarily, granting the Writ, vacating the judgment of the Court of Appeals, and remanding the case to the District Court for retrial.

The Honorable Judge Huxman, in dissenting to the order of the Court of Appeals on reconsideration, protests

that this matter is of sufficient gravity that additional arguments or briefs should have been required in order that the intent of this Court as expressed in its mandate might be made effective. (O.R. 3) The instruction of the lower court departed from the accepted and usual course of judicial proceedings so as to constitute a violation of petitioners' rights under the Fifth Amendment of the Constitution of the United States of America, depriving them of their liberty and property without due process of law.

The petitioners are aggrieved because an appeal to the Court of Appeals and two petitions for Writ of Certiorari to this Court with all of the attendant costs have been required to correct an error which the Government concedes, and which error should have been promptly corrected by the trial court when objection was seasonably made.

II.

The Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute an employer a co-conspirator when such guilty knowledge was acquired by the employee acting in the scope of his employment. (Majority Opinion O.R. 121).

The trial court made no distinction between the first three substantive offenses charged in the Information and the conspiracy charged in the Information, when it stated that the agent or employees of the petitioners acting within the course of their employment, the act of the agent is the act of the master and of the employer (O.R. 93). Neither did the Court of Appeals, in affirming the decision, make such a distinction when approving the instruction that the employers are charged with the guilty knowledge and acts of the employees in determining the question of wilfulness (O.R. 121). The agents were employed to sell sewing machines, a legitimate business operation. The jurors were instructed that the petitioners were chargeable with the

acts of their agents in the selling of sewing machines. The court ignored the principle that a conspirator must have knowledge of the conspiracy. The decision in this regard is contrary to the decision of this Court holding that persons having no knowledge of the conspiracy are not conspirators. United States of America, Petitioner vs. Salvator Falcone, 311 U. S. 205, 85 L. Ed. 128. This Court in commenting upon the Falcone decision in a later case, Direct Sales Co., Petitioner, vs. United States of America, 319 U. S. 703, 87 L. E. 1674; at p. 711 U. S.; and P. 1681 L. Ed. stated that,

> ". . . without the knowledge the intent cannot exist. Furthermore to establish the intent the evidence of knowledge must be clear not equivocal, this, because charges of conspiracy are not to be made out by piling inferences upon inferences, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

The Solicitor General of the United States agrees, in his memorandum filed in connection with our previous petition, with our contention that the conspiracy count in the case must stand or fall on the validity of the general instruction as discussed under Point I of this argument.[1]

III.

The Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offense, that there was sufficient evidence to support the verdict of guilty. (O.R. 121, 122)

The Defense Production Act of 1950 includes "wilful violation" as an element of the offense (Appendix 16). Each count of the Information charged wilfulness on the part of the defendants. (O.R. 3, 4) The action of both the trial court and Court of Appeals as hereinbefore described,

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[1] P. 7, Solicitor's Memorandum, "We therefore agree that the case must stand or fall on the validity of this general instruction."

has interpreted the Defense Production Act as an act wherein the guilty knowledge of the employees may be charged to the employers in determining the question of wilfulness. We do not believe that such was the intent of Congress. Since both the trial court and the Court of Appeals assume the petitioners were responsible for the criminal acts of their employees, and that such acts charged guilty knowledge to the employers in determining the question of wilfulness under the statute, the petitioners have never had the sufficiency of the evidence to support the verdict of guilty against them correctly determined in the light of existing law.

If all evidence not properly connected with petitioners were eliminated there are no facts upon which a jury could determine that Mr. Gordon had knowledge of the acts of his employees. Although Mr. Tempkin was in Salt Lake City during the time the alleged acts were committed, the evidence against him is extremely flimsy. We respectfully again call the Court's attention to the state of that evidence as previously set out herein at pages 4, 5 and 6. (O.R. 29-92)

A verdict of guilty under the charges as set forth in the information, even with proper instructions from the court, would require unwarranted presumptions not justified in law. The petitioners having been required to travel this long and tortuous route to secure simple justice have been once placed in jeopardy. Since the evidence would not justify a conviction under proper instructions the government has had its day in court.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

JOHN S. BOYDEN,
Counsel for Petitioners.

ALLEN H. TIBBALS,
of Counsel

Dated December 18th, 1953.

APPENDIX

TITLE VI—CONTROL OF CONSUMER AND REAL ESTATE CREDIT

Tit. 50, App. U.S.C. 2131

"§ *2131. Power to exercise consumer credit controls*

"To assist in carrying out the objectives of this Act [sections 2061-2166 of this Appendix], the Board of Governors of the Federal Reserve System is authorized, notwithstanding the provisions of Public Law 386, Eighteith Congress (61 Stat. 921), to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary, but in no event beyond the date on which this section terminates: • • •" Sept. 8, 1950, c. 932, Title VI, Sec. 601, 64 Stat. 812; July 31, 1951, 7:00 P.M. E. D. T., c. 275, Title I, Sec. 106 (a), 65 Stat. 138.

Tit. 50 App. U.S.C. 2133

"§ *2133. Penalties*

"Any person who willfully violates any provision of section 601, 602, or 605 [sections 2131, 2132, or 2135 of this Appendix] or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both. Sep. 8, 1950, c. 932, Title VI, § 603, 64 Stat. 814; July 31, 1951, 7:00 p.m., E. D. T., c. 275, Title I, § 106(b), 65 Stat. 138."

PART 222—CONSUMER CREDIT

REGULATION W

Sept. 8, 1950, 15 F. R. 6118

"§ *222.2 General requirements and registration* —(*a*) *General requirements.* Each person engaged in the business of making instalment sales or in-

stalment loans, or engaged in the business of lending on the security of or discounting or purchasing obligations arising out of such credit, is referred to in this part as a 'Registrant'; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him or out of any such obligation lent on or discounted or purchased by him, except on the following conditions:

"(1) He must have a license, and each Registrant is hereby granted such a license, but such license of a Registrant may be suspended in the manner and on the grounds stated in § 222.8(b); and

"(2) The credit extended, renewed revised or consolidated by him, or giving rise to the obligation discounted or purchased by him or acquired by him as collateral must comply with the applicable requirements of this part.

• • •

"§ *222.3 Instalment sales; general rules.* • • •

"(*a*) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (c) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

• • •

"(*c*) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article; except that in the case of an article listed in Group D of § 222.9, the down payment shall be obtained at or before the time of beginning the agreed-upon repairs, alterations, or improvements.

• • •

"§ *222.6 Certain technical provisions* — • • •

"(*c*) *Record of instalment sale.* The record of an instalment credit arising from the sale of a

listed article and required by § 222.3(b) shall set forth (in any order) the following information:

"(1) A brief description identifying the article purchased;

"(2) The case price of the article;

"(3) The amount of the purchaser's down pament (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating the monetary value assigned thereto in good faith;

"(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

"(5) The time balance owned by the purchaser, which is the sum of items (2) and (4) minus item (3); and

"(6) The terms of payment.

The record need not include a description of the article if it is purchased by means of a coupon book or similar medium of instalment credit upon which there has been made a cash down payment of at least as great as the highest down payment required by this part on any article sold by the Registrant. The record need not include the information called for by items (2) and (4) if the Registrant is one who, with respect to the article, customarily quotes to the public a time price only which includes the finance or other charges if any, provided he sets forth such time price in such record, and provided he obtains a cash down payment which is at least as large as would be required if the percentage specified for the article in § 222.9 were applicable to the time price. • • •

"§ *222.9 Supplement.*

"*Part 1. Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used, are 'listed articles,' and the following required down payments and

maximum loan values are prescribed (such down payments and loan values to be calculated as specified in Parts 4 and 5 of this section; but such down payment and loan value requirements shall not apply in the case of a listed article having a cash price of less than $50, exclusive of any applicable sales tax:

• • •

"Group B-25 percent minimum down payment, 75 percent maximum loan value:

• • •

"9. Sewing machines designed for household use."

CHAPTER 19 — CONSPIRACY

Tit. 18, U.S.C. 371

"§ *137. Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

(Footnote to § 371)

"Historical and Revision Notes"

"Reviser's Note. Based on Title 18, U.S.C., 1940 ed., §§ 88,294 (Mar. 4, 1909, c. 321, §37, 35 Stat. 1096 [derived from R.S. §5440]; Mar. 4, 1909, c. 321, § 178a, as added Sept. 27, 1944; c. 425, 58 Stat. 752).

"This section consolidates said sections 88 and 294 of Title 18 U.S.C., 1940 ed. • • •"